In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 226

VIRGINIA C. SHAFFER,
Appellant,
vs.
ANITA VALTIERRA, et al.

On Appeal from the United States District Court
for the Northern District of California

Brief of Appellant Virginia C. Shaffer

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OPINION BELOW

The Opinion of the District Court will be reported in 313 F.Supp. 1 *sub. nom. Valtierra v. Housing Authority of the City of San Jose,* et al., and *Hayes v. Housing Authority of San Mateo.* It appears in the Appendix at 168-179.[1]

JURISDICTION

This is a suit to enjoin enforcement of a provision of the Constitution of California—in the words of the complaint, "to invali-

1. By advice of the clerk, July 10, 1970, there is a consolidated Appendix for this case and *James v. Valtierra,* No. 154, Oct. Term, 1970, the two cases being appeals by different defendants from the same judgment. Reference to the Appendix hereafter appears as "A.".

All emphasis in quotations in this brief has been added unless otherwise stated.

date Article 34 of the California Constitution" (Comp. ¶ 1; A.2). The jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331 and 1343, 42 U.S.C. § 1983, and the Equal Protection clause of the 14th Amendment (Complt. ¶ 2; A. 2).[2] On April 2, 1970, a three-judge court, convened under 28 U.S.C. §§ 2281, 2284, entered summary judgment, comprising a declaratory judgment and permanent injunction (A. 178-9). The Notice of Appeal was filed April 10, 1970 in the District Court (A. 166).

This Court has jurisdiction under 28 U.S.C. § 1253, the appeal being from a permanent injunction by a three-judge court against enforcement of or obedience to a provision of a State Constitution. *Dandridge v. Williams*, 397 U.S. 471 (1970); *Florida Lime & Avocado Growers v. Jacobsen*, 362 U.S. 73 (1960); *A.F. of L. v. Watson*, 327 U.S. 582 (1946). This Court noted probable jurisdiction on June 29, 1970.

CONSTITUTIONAL PROVISIONS INVOLVED

14th Amendment, Constitution of the United States:

> "* * * nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws."

Article XXXIV of the Constitution of California (Cal. Stats. 1951 cxxiv):

> "SECTION 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

2. Jurisdiction was also invoked under the Privileges and Immunities and Supremacy Clauses. The court below found the "Supremacy argument unpersuasive" and did not reach the Privileges and Immunity Argument, as it "decides the case on Equal Protection grounds" (A. 172).

"For the purpose of this article the term 'low rent housing project' shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. For the purposes of this article only there shall be excluded from the term 'low rent housing project' any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any state public body and the Federal Government in respect to such project.

"For the purposes of this article only 'persons of low income' shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

"For the purposes of this article the term 'state public body' shall mean this State, or any city, city and county, county, district, authority, agency, or any other subdivision or public body of this State.

"For the purposes of this article the term 'Federal Government' shall mean the United States of America, or any agency or instrumentality, corporate or otherwise, of the United States of America.

"SEC. 2. The provisions of this article shall be self-executing but legislation not in conflict herewith may be enacted to facilitate its operation.

"SEC. 3. If any portion, section or clause of this article, or the application thereof to any person or circumstance, shall for any reason be declared unconstitutional or held invalid, the remainder of this article, or the application of such portion, section or clause to other persons or circumstances, shall not be affected thereby.

"SEC. 4. The provisions of this article shall supersede all provisions of this Constitution and laws enacted thereunder in conflict therewith."

STATUTES INVOLVED

28 U.S.C. § 1253:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

28 U.S.C. § 1343:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

28 U.S.C. § 2281:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

QUESTIONS PRESENTED

1. Where a State provides no manner of public housing except low rent housing for persons of low income, does the State Constitution violate the equal protection clause of the 14th Amendment, merely because it provides that no low-rent housing

project shall be developed, constructed or acquired by any state public body unless the project has been approved by a majority of the voters in the locality of the project?

2. Should the issue have been decided on summary judgment, particularly where plaintiffs' standing to sue is, at best, dubious, and the case below was essentially a feigned case?

The first question is, verbatim, the question expressed in our Jurisdictional Statement. The second question is fairly comprised therein within the meaning of this Court's Rule 40(d)(1). The Jurisdictional Statement emphasized that appellant Shaffer obtained separate counsel to come before this Court, after the appeal was taken, in the belief that the other appellants from the same judgment (the appellants in No. 154) were utilizing the appeal to obtain this Court's affirmance of the judgment, not its reversal,[3] and that the case had been decided on summary judgment upon the basis of the sketchiest record (Juris. Stat. pp. 12, 19).[4]

STATEMENT OF THE CASE

1. The genesis of Article XXXIV of the California Constitution

"The United States Housing Act of 1937 (42 U.S.C.A. §§ 1401-1430)[5] established a federal housing agency authorized to make loans to state agencies for the purpose of slum clearance and low-rent housing projects. The California Legislature made the benefits of the federal act available to the cities and counties of this state by enacting the Housing Authorities Law * * *.

"The legislation created in each city and county a public housing authority * * *. The exercise of the powers entrusted by the

3. Our Jurisdictional Statement, p. 2., contains a statement of which part 8 at pages 15, 16, infra, is substantially a copy.

4. For example, at p. 19: "This kind of argument illustrates the vice of a summary judgment. *If* questions like these are relevant at all to the issue in the case, there should be a plenary trial in which a complete and factual basis for a constitutional determination can be made." [Italics in original]

5. Act of Sept. 1, 1937, c. 896, 50 Stat. 888, as amended.

Legislature to these agencies was made subject to the preliminary condition that the local governing body, in each case, must formally resolve that public housing is needed."[6]

On November 7, 1950, the People of the State of California at a general election added Article XXXIV to the State Constitution, providing that no low-rent housing project shall proceed without prior approval by the voters of the locality. *What occasioned its adoption was the discovery of a gap in California in the referendum system.* The initiative and referendum are integral parts of the distribution of sovereignty in California. Article IV, Sec. 1, of the California Constitution, on the Legislative Department, vested legislative power and added

> "but the people reserve to themselves the power to propose laws or amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature, and also reserve the power, at their own option, to so adopt or reject any Act, or section or part of any Act, passed by the Legislature."

The same section itself provides the machinery and also provides that

> "The initiative and referendum powers of the people are hereby further reserved to the electors of each county, city and county, city and town of the State to be exercised under such procedure as may be provided by law."[7]

Section 1603 of the Charter of the City of San Jose provides for referenda generally.

But in June 1950 the Supreme Court of California held that the acts of a local governing body and housing authority under the Housing Authorities Act of California relative to applications to the federal housing authority were "executive and administrative," not

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6. The foregoing is quoted from *Housing Authority v. Superior Court*, 35 Cal. 2d 550, 552-53, 219 P.2d 457, 458 (1950).

7. The language of the foregoing provisions was simplified in 1966 but without change of substance.

"legislative", and therefore not reached by the power of referendum. *Housing Authority v. Superior Court*, 35 Cal. 2d 550, 219 P.2d 457 (1950). It was in *immediate* response to this decision that Article XXXIV was adopted by the electorate less than 6 months later. To the mind of the electorate Article XXXIV was not new but a reaffirmance of a policy going back for years.

2. The propriety and reasonableness of the requirement of Article XXXIV was immediately recognized by Congress

The propriety and reasonableness of a requirement that there be no low rent public housing unless first approved by the electorate so appealed to the Congress of the United States that it almost immediately made it nationwide by the Independent Offices Appropriations Act the year after Article XXXIV was adopted in California. The Act of August 31, 1951, c. 376, Title I, 65 Stat. 277 provided:

> "*Provided further,* That the Public Housing Administration shall not, after the date of approval of this Act, authorize the construction of any projects initiated before or after March 1, 1949, in any locality in which such projects have been or may hereafter be rejected by the governing body of the locality or *by public vote,* unless such projects have been subsequently approved by the same procedure through which such rejection was expressed."

The next year Congress repeated the prohibition, in exactly the same language, in the Act of July 5, 1952, c. 578, Title I, 66 Stat. 403. The following year Congress reasserted the policy in the First Independent Offices Appropriation Act of 1954 (Act of July 31, 1953, c. 302, Title I, 67 Stat. 306), thus:

> "*Provided further,* That unless the governing body of the locality agrees to its completion, no housing shall be authorized by the Public Housing Administration, or, if under construction continue to be constructed, in any community *where the people of that community, by their duly elected representatives, or by referendum, have indicated*

they do not want it, and such community shall negotiate with the Federal Government for the completion of such housing, or its abandonment, in whole or in part, and shall agree to repay to the Government the moneys expended prior to the vote or other formal action whereby the community rejected such housing project for any such projects not to be completed plus such amount as may be required to pay all costs and liquidate all obligations lawfully incurred by the local housing authority prior to such rejection in connection with any project not to be completed."

3. The basis on which Article XXXIV was submitted to the People of California and adopted by them

The California Constitution (former Art. IV, § 1, ¶ 11) required the Secretary of State before any election to prepare an official pamphlet and distribute it to every voter, containing arguments for and against every proposition to be voted upon. A copy of that portion of the 1950 Ballot pamphlet relating to Proposition 10, which became Article XXXIV of the State Constitution, appears at A. 49-54.

The Argument in Favor of Initiative Proposition No. 10 contained no appeal to racial prejudice and nothing against public housing; it was an appeal to "grass roots democracy" and "strong local self-government." In full, it reads thus:

> "A 'YES' vote for this proposed constitutional amendment is a vote neither for nor against public housing. It is a vote for the future right to say 'yes' or 'no' when the community considers a public housing project.
>
> "Passage of the 'Public Housing Projects Law' will restore to the citizens of a city, town, or county, as the case may be, the right to decide whether public housing is needed or wanted in each particular locality. Such is not the case at present.
>
> "Time after time within the past year California communities have had public housing projects forced upon them without regard either to the wishes of the citizens or community needs. This is a particularly critical matter in view

of the fact that the long-term, multimillion-dollar public housing contracts call for tax waivers and other forms of local assistance, which the Federal Government says will amount to HALF the cost of the federal subsidy on the project as long as it exists.

"For government to force such additional hidden expense on the voters at a time when taxation and the cost of living have reached an extreme high is a 'gift' of debatable value. It should be accepted or rejected by ballot.

"If, on the other hand, certain communities are in such dire need of housing that the cost of long-term subsidization is deemed worth while, local voters, who best know that need, should have the right to express their wishes by ballot.

"In either case, a 'YES' vote for this proposed amendment will strengthen local self-government and restore to the community the right to determine its own future course.

"Furthermore, the financing of public housing projects is an adaptation of the principle of the issuance of revenue bonds. Under California law, revenue bonds, which bind a community to many years of debt, cannot be issued without local approval given by ballot. Public housing and its long years of hidden debt should also be submitted to the voters to give them the right to decide whether the need for public housing is worth the cost.

"A 'YES' vote for the 'Public Housing Projects Law' is a vote for strong local self-government. It is an expression of confidence in the community's future and in the democratic process of government. To strengthen the grass roots democracy which has made America protector of the world's free peoples, vote 'YES' on the Public Housing Projects Law."

The principal literature distributed to the electorate by the proponents of Proposition 10, a Facts Booklet, contained these statements:

"Why Is Proposition 10 Needed?

There is a vital reason for this Proposition!

Our California Constitution, until now, has protected the

taxpayers against huge long-term debt without prior approval of the voters. But Public Housing projects have been able to avoid this voting requirement through a technicality.

In effect, it provides for determination on the level of the voter of matters vitally affecting tax rates and home rentals, for in each instance of public housing development, taxable property is removed from taxation, and the burden of paying for fire, police, street, sewer, school and other public expenses for these projects must be passed on to the other taxpayers—who, in the case of landlords, will in turn pass them on to tenants.

* * *

Proposition 10 Fits the American Tradition That Voters Should Approve Projects Involving Long-Term Public Debt

Local citizens in America have traditionally enjoyed the right of decision in the case of community projects such as schools, transit systems, highway developments, public buildings, water districts and others involving long-term public debt. But the California Housing Act, through its wording, removed that right in the case of public housing, which involves the same considerations of cost and taxation.

Proposition 10 is intended to remedy that oversight in the law, and restore the right of decision to the voters.

It should be particularly noted that the amendment does not require a special election, though it authorizes such an election.

Removes Housing From 'Pressure Politics'

The amendment will particularly protect public housing from the present evils of pressure politics. Under Proposition 10, the necessity for any public body acting under such political pressures is removed, because it becomes mandatory to pass the proposal to the voters themselves for action.

Voters in many other states are allowed this privilege of American tradition, but because of a loophole in the California Housing Authorities Law, voters of California are

denied the right of referendum in the case of public housing. The people of two California cities—Eureka and Oakland—protested action of their city councils in approving such housing projects, even going so far, in Oakland, as to oust a councilman in a recall election. However, lacking the legal provision for referendum the people of Eureka and Oakland lost out and were saddled with political housing projects the majority did not want. Housing Authority bureaucrats throughout California have united in an all-out fight to deny the people the right to decide on such heavy long-term indebtedness. The people have the opportunity to put the bureaucrats in their place and restore to themselves, the people, this important right by passing Proposition 10."

4. The proposed Housing Project in the City of San Jose and its rejection by the electorate

In 1966 the San Jose City Council resolved that there was a shortage of safe and sanitary dwellings in the city available to persons of low income and that there was need for a housing authority.[8] It then appointed the commissioners for the Housing Authority as provided by California law (Compl., Ex. F; A. 25).

In 1968, in obedience to Article XXXIV of the State Constitution, the Housing Authority proposed to the voters of San Jose a low-rent housing project. The measure failed of passage at the election of November 5, 1968 by 57,896 votes to 68,527 (Complt., Ex. G; A. 28).[9]

5. This suit: the complaint

This suit was commenced on August 27, 1969. According to the complaint, plaintiffs are three mothers and their minor children, living in crowded or substandard housing (Compl. ¶¶ 5-8;

8. Pltfs. Request for Admn. attaching Resolution No. 28614, admitted by defendants. (A. 25-27, 41, 57).

9. Taxpayers' revolt in California has been statewide; few proposals for bonded indebtedness have surmounted the general concern over mounting taxes.

A. 3-5). The Jurisdictional Statement of the appellants in No. 154 asserts (at p. 2) that this "is a class action on behalf of the poor." That is not correct. The complaint alleged that plaintiffs sued on behalf of a class consisting of "all persons who are citizens of the United States and who are on the waiting list of the Housing Authority of the City of San Jose." (Compl. ¶ 9; A. 5). But F.R.Civ.P. Rule 23(a) provides that an action may not be maintained as a class action until a determination is made by the court that it may be so maintained. No such determination was ever sought or made. The action, therefore, is not a class action.

Named as defendants are the Housing Authority of San Jose, its Executive Director and Commissioners, the City Council of San Jose and its members, including appellant Virginia C. Shaffer (Request for Adm. ¶¶ 15, 18; A. 43, 58).[10] After mingled statements of law, fact, and conclusions under the captions "The Public Housing Program in California" and "Public Housing in San Jose", the complaint contained three counts for declaratory relief and injunction. The first claimed a denial of equal protection of the laws, and it is the only count on which the court below based its judgment (See fn. 2 p. 2, supra). The prayer was for a declaration that Article XXXIV is void, for a mandatory injunction enjoining defendants "from refusing to proceed with the necessary steps leading to the construction of the 1,000 public housing units proposed by the Housing Authority of the City of San Jose in 1968 . . ." and for an injunction against ". . . enforcing, following[,] abiding by or relying on any of the provisions of Article 34 of the California Constitution." (A. 13).

Welcoming the suit as a means of being released from the obligation of their official oath to the State Constitution, the defendant members of the Housing Authority freely admitted allegations of the complaint and requests for admission. (A. 39,

10. The complaint also purports to name as defendants the United States Department of Housing and Urban Development and Secretary Romney. They were dismissed on motion (A. 171-2).

40, 55). The answer filed by the City Attorney for the defendant City councilmen, including appellant Shaffer, admitted much but did deny material allegations of the complaint (A. 63-68).

6. The meager record in the case

The record consists of the pleadings, affidavits attached to the complaint, responses to a request by plaintiffs for admission, certain additional affidavits, and a Stipulation of Fact. *There was no trial.* On that record plaintiffs moved for summary judgment. The record consists of the following alone:[10a]

(a) Identification of the plaintiffs, the kind of housing in which they live, the rent they pay, their income, and what they receive from public welfare authorities (Compl. Ex. A, B, C; A. 14-20).

(b) An admission that the Housing Authority of San Jose "will not make application to HUD for a preliminary loan," and the City Council will not approve such an application or any construction contract for public housing, "until the proposal has been approved by the electorate in accordance with Article 34" (Pltfs. Request for Admn. ¶¶ 16, 19, 20; A. 43, 44, 57, 58).

(c) Affidavits of one Lockheld, an employee of the Planning Department of Santa Clara County (in which San Jose is located), that there is a shortage of low-cost housing in that county, and that rents are increasing, with the opinion that lack of adequate housing correlates with low income and minority status (A. 59-62), and an affidavit of one Wells, an employee of the San Jose City Planning Department, that in his opinion low income is the factor most highly correlated with substandard housing. (A. 67)

10a. Appellees have caused to be reproduced in the Appendix the record of *Hayes v. Housing Authority of San Mateo County* (A. 79-165). But that is no part of the record in *this* case. In *Hayes* all defendants defaulted (A. 160), and the case is not before this Court because no appeal was taken. The motion for summary judgment upon which judgment was entered in the instant case (A. 65) specified exactly what it relied on, and it specified no part of the file in *Hayes*.

(d) *A Stipulation of Fact* that housing for rental to persons of low income (as defined by Article XXXIV of the California Constitution) is the only kind of public housing in California, except for housing for state officials and state university personnel and housing incidentally acquired and temporarily held in connection with eminent domain proceedings. (A. 67, 68).

7. The motion for summary judgment and the decision below

Upon this bare and sparse record, plaintiffs moved for summary judgment (A. 68, 75, item 32,) and the District Court granted the motion. It declared that "Article XXXIV of the California Constitution is * * * unconstitutional and shall have no further force and effect" under the Equal Protection Clause of the 14th Amendment, and it enjoined the defendants "from abiding by or relying upon Article XXXIV as a reason for not requesting state or federal assistance with which to finance low income housing." (A. 178-9)

Obviously, the District Court declared Article XXXIV to be unconstitutional on its face, as an abstract textual conclusion reached by laying Article XXXIV alongside the 14th Amendment, for no other facts in the record were relevant to its conclusion. The facts identifying plaintiffs are no more than an effort to show standing to sue. The affidavits of the employees of the Santa Clara and San Jose planning departments state no more than that there is a need for low-cost housing.

The District Court placed its chief reliance on *Hunter v. Erickson,* 393 U.S. 385 (1969). Deciding the case solely on Equal Protection grounds, it said: "The gravamen of plaintiffs' Equal Protection claim is that the express discrimination in Article XXXIV, as it applies only to 'low-income persons', brings it squarely within the ban of a long line of Supreme Court decisions forbidding the unequal imposition of burdens upon groups that are not rationally differentiable in the light of any legitimate State legislative objective." (A. 173)

Noting that the plaintiffs in the *Hayes* case—although not those in the instant case—asserted that Article XXXIV also denies equal protection to Negroes, the court reviewed *Hunter v. Erickson* at length and concluded (A. 176).

> "Here as in the *Hunter* case, the 'special burden' of a referendum is not ordinarily required; here, as in the *Hunter* case, the impact of the law falls upon minorities."

The District Court added (A. 176)

> "The vice in this case is that Article XXXIV makes it more difficult for state agencies acting on behalf of the poor and the minorities to get federal assistance for housing than for state agencies acting on behalf of other groups to receive financial federal assistance. In California, state agencies may seek federal financial aid, without the burden of first submitting the proposal to a referendum, for all projects except low-income housing. Some common examples, *inter alia,* are: highways, urban renewal, hospitals, colleges and universities, secondary schools, law enforcement assistance, and model cities."

8. The Appeal; the reason for the separate representation of Appellant Shaffer

The present case is one of two raising the same issue, consolidated below for hearing. In the other, *Hayes v. Housing Authority of San Mateo,* (A. 79 et seq.), defendants did not even put up a token case; they defaulted (A. 160). Here the defendant Housing Authority of San Jose and those defendants who are members or officers of that Housing Authority have not even appealed. Appellant Shaffer is a member of the City Council of the City of San Jose, California and, as such, one of the defendants. After the notice of appeal was filed in the District Court—in haste[11]—by the City Attorney on behalf of all the council members, Mrs. Shaffer substituted attorneys and has

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11. The Notice of Appeal was filed just 8 days after the judgment below (A. 76).

come before this Court by separate counsel. This she has done because, in her belief, her fellow council members (the appellants in No. 154) do not desire the judgment to be reversed but seek to utilize the appeal to obtain this Court's affirmance in order to be freed of constraints of the Constitution of California. They appealed because, in the absence of voter approval, bond counsel will not approve bonds of the City and HUD will not approve an application for funds, unless this Court rules that Article XXXIV is unconstitutional. This is pretty much disclosed at page 16 of the Jurisdictional Statement in No. 154.

SUMMARY OF THE ARGUMENT

The decision embraces the long outmoded usage of the Fourteenth Amendment to strike down disfavored state policies, and it conflicts with the principles applied in *Spaulding v. Blair*, 403 F.2d 862 (4th Cir. 1968), *Ranjel v. City of Lansing*, 417 F.2d 321 (6th Cir. 1969), cert. denied 397 U.S. 980, and *Southern Alameda Spanish Speaking Org. v. City of Union City, Cal.*, 424 F.2d 291 (9th Cir. 1970). The assault on Article XXXIV of the California Constitution is an expression of a new distrust of democracy in favor of an elitism contemptuous of the wisdom and decency of the electorate. (p. 25, *infra*)

I. (pp. 26-31, *infra*)

The case was handled below essentially as a feigned case, with plaintiffs' standing to sue dubious, on a motion for summary judgment on self-serving affidavits not subject to cross-examination, without real opposition. Even under the most liberal criteria of "standing", a plaintiff must be injured in fact by the challenged action, and the case must be in a real adversary context. (*Data Processing Service v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970). Plaintiffs claimed no more than that they were on the waiting list for housing; it was conceded that none can show that he would obtain new

housing if built. In fact, a trial would show that the low-income housing needed by the City of San Jose is not the kind plaintiffs require. Plaintiffs are merely names, conscripted by counsel who seek an advisory opinion. On the other hand, there has been no real defense. In the companion *Hayes* case, all defendants defaulted. Here the Housing Authority defendants essentially admitted the complaint and have not appealed. The City Council defendants put up indifferent opposition and appealed in order to obtain this Court's approval of the judgment, not reversal, except for appellant Shaffer who retained new counsel after appeal.

Because of the lack of real contest, the opinion below rests on unfounded assumptions of fact. For example, it leans on a premise that the public rejects low-income housing projects, reciting statistics covering 1950 to June 1968. Yet these very statistics show that 69% of the elections resulted in approval. Nor was the court informed that in the 19 subsequent elections from 1968 to date, 84% carried, and its attention was not called to the fact that the San Jose vote in 1968 was the only defeat in 11 public housing ballots in the State at that time. Similarly, unwarranted insinuations that rejection of public housing is racial discrimination ignores the fact that in the county in question the ratio of poor Negroes and Mexican-Americans to the total poor is practically identical with the ratio of all Negroes and Mexican-Americans to the total population. Thus poverty does not equal race in the locality.

In short, the judgment outlaws Article XXXIV as a bare metaphysical abstraction divorced from any stuff of reality, and outside of any real "case or controversy".

II.

(A) (pp. 31-32, *infra*). This case is unlike *Hunter v. Erickson*, 393 U.S. 385 (1969), or *Reitman v. Mulkey*, 387 U.S. 369 (1967), because Article XXXIV makes no racial classification, is not

expressed in terms of race or discrimination, and its adoption was animated by no racial purpose.

(B) (pp. 32-38, *infra*). Motives or purposes may not be taken on summary judgment, in favor of the judgment, *Fortner Enterprises, Inc. v. United States Steel Co.* 394 U.S. 495, 500 (1969). In fact, entirely legitimate reasons motivated the adoption of Article XXXIV and motivate voter treatment of housing projects. Article XXXIV was adopted in 1950 for reasons having nothing to do with either race or poverty. From the beginning of California's history as a State, its public policy has been that no major public indebtedness or liability may be incurred by any city or county without approval by the voters. (Cal. Const., Art. XI, Sec. 18; *Westbrook v. Mihaly,* 2 Cal. 3d 765 (June 30, 1970)). So also, it has long been California's public policy that every legislative action, state or local, is subject to referendum (Cal. Const. Art. IV, Sec. 1). Loopholes in both of these public policies, as applied to low-income housing, were discovered when the State Supreme Court held that a "housing authority" is not a "city or county" and may therefore incur indebtedness not subject to Art. XI, Sec. 18 (*Housing Authority v. Dockweiler,* 14 Cal.2d 437; 94 P.2d 794 (1939)) and that acts of the local governing body and housing authority relative to low-income housing were "executive and administrative", not legislative, and therefore not subject to referendum (*Housing Authority v. Superior Court,* 35 Cal. 2d 550, 219 P.2d 457 (1950)). It was in response to these decisions, and in immediate response to the latter, that Article XXXIV was adopted, *not as a new policy applicable to housing, but as reaffirmation that housing should not be immune from ancient policies of universal application and that housing officialdom should not be singled out for preferential freedom from basic controls.*

The considerations of *fiscal control* are important, because low-rent housing projects impose on the local government the burden for 40 years of supplying all municipal services—schools,

police and fire protection, streets, sewers, drains, etc.,—with taxes waived. The financial burden on the locality approximates 60% of what normal tax receipts would be, even on values calculated at the low rental base, and 50% of the federal contribution.

The *non-fiscal* considerations also loom large. Many reasons unrelated to race or poverty exist why voters may disapprove a particular housing project. After years of experience, students of the subject and spokesmen for the poor and minority groups increasingly reject public housing. The Kerner Commission report shows conventional public housing to be psychologically debilitating and sociologically oppressive. Experts accuse public housing of creating problems in city planning, redevelopment, zoning, aesthetics, as working major changes in the urban environment, creating "central city" ghettos, thereby breeding racial segregation and compounding crime and social disorganization. The national housing program as practiced is accused of having been destructive of community, compartmentalizing modes of living unrelated to human needs and desires. *Surely voters are entitled to a voice in decisions which may alter the characteristics of their environment for generations.*

Accusation that the poor in California are not as well-housed as elsewhere is based on meretricious use of statistics. If the issue were relevant, there should be a plenary trial to develop a complete and factual basis for constitutional determination, not disposition by summary judgment. The accusation rests on simply counting the number of publicly-built low-income units *per capita.* It overlooks the fact that elsewhere than California so much more private housing becomes uninhabitable as to offset public housing, and that there are other federal housing programs conceived after the Housing Act of 1937, hailed as vastly superior, and not subject to Article XXXIV. There are the leased-housing rent subsidy, in which California has taken the lead, rent supplement programs, and direct interest subsidies to lenders

on private construction. A report to the National Commission on Urban Problems concludes that the shelter needs for a large part of the low and moderate income population can best be served through federal stimulation of private development and by cash subsidies. The question is not whether one method of providing housing is better than another. The point is that voters may legitimately think so and may therefore deny to a housing authority the option of choosing an easy but unwise solution.

C. (pp. 43-45, *infra*). Apart from racial classification, "equal protection" is not denied if any state of facts can be rationally conceived to support a State classification. Furthermore, one who complains must show that someone comparably situated has been better treated. *National Union v. Arnold,* 348 U.S. 37, 41 (1954).

Here there is no classification by race, nor is there either classification by poverty or discrimination against poverty. The statement that laws may not deprive the poor of basic rights of citizens is true but not apropos. Indigency is a social, economic and political situation to which government must give its attention, and directing legislation to the problem of poverty is not classification on the basis of poverty. In turning its attention to the subject, a state has vast freedom as to what to do and how. Apprehending a need or an evil, the lawmaker may focus on it and legislate about it without requiring similar treatment of other matters, *Patsone v. Pennsylvania,* 232 U.S. 138 (Holmes, J., 1914), *Barbier v. Connelly,* 113 U.S. 27, 32 (1885). Classification is not measured by an apothecary's scales. Publicly-supported housing is a subject by itself, and of its very nature it concerns those of low income.

D. (pp. 45-52, *infra*). There is no claim of discrimination *within* the area of public housing; that is, no claim that Article XXXIV discriminates among those to whom it applies or within its subject matter. Therefore, the district court sought to draw an external contrast with other federal-aid programs—specifically,

highways, urban renewal, hospitals, education, law enforcement, and model cities, asserting that Article XXXIV makes it more difficult to obtain federal-aid for housing. The contrast is specious and unsound, cursory, without citation of statute, with neither analysis nor statement of what the other programs are, when they came into being, how they operate, or wherein there is such likeness to housing as to require identity of treatment. These programs all vary widely. Otherwise Congress itself would be guilty of unequal protection in the widely different ways it has tailored its offers of aid and has conditioned them. A provision of ancient vintage, neither originally adopted nor carried forward for an unlawful purpose, does not violate the equal protection clause. *Carter v. Jury Commission,* 396 U.S. 320 (1970). Therefore, a state Act that cannot be accused of denying equal protection when adopted, because nothing then exists against which it can be said to discriminate, does not passively become unconstitutional from the fact that the federal government later creates programs of assistance in other fields. Except for urban renewal and some hospital aid, all the federal programs mentioned by the court were created by Congress long after Article XXXIV was adopted, and California made no statutory response to urban renewal until after the adoption of Article XXXIV.

Urban renewal is a subject so peculiar and complex that it covers 110 pages in California's statute books, and voter approval *is* specifically required in every vital respect (see Cal. statutes cited on pp. 48, 49, *infra*). Indeed, it was gratuitous assumption below to suggest that other programs do not require voter approval at vital nodes under the general provisions of the state constitution and city charters.

The attempted contrast of housing with aid to highways is particularly not apt. One of the prime motives underlying Article XXXIV was to protect the local taxpayer and to preserve local responsibility. But in California highways and roads to not involve the local purse; the cost is borne by the State treasury

(See statutes cited at pp. 49, 50, *infra*). As for federal aid to education, we find nothing in state or federal statutes requiring local governmental agencies to share the expense of the federally-aided programs. And as to law enforcement assistance, California has not yet enacted legislation governing how state or localities are to respond to the offer.

Moreover, none of the federal aid programs referred to below raises any of the political, sociological or environmental questions that housing does. Thus no one can object to better hospitals. Hospitals serve the whole public; if any "group" is more advantaged than another, it is the poor themselves.

E. (pp. 52, 53, *infra*). The very federal legislation which led to Article XXXIV demonstrates the reasonableness of requiring voter approval. The Housing Act of 1937 emphasizes that local control and local determination of need are the keynote policy (42 U.S.C. § 1401, 1415 (7)(a,b). What more reasonable than that the voice of local determination be the voice of the people themselves? Eight months after California adopted Article XXXIV Congress by the Independent Offices Appropriation Act specified that the federal housing authority "shall not" authorize any project rejected by public vote in the locality. Congress repeated the proscription in the two following years (see p. 7, *supra*). Although not repeated after 1953, this federal proscription demonstrates the reasonableness of placing low-cost housing in its own category peculiarly justifying voter approval.

F. (pp. 54-61, *infra*). Since motive and purpose of the adoption of Article XXXIV and of voter action under it are not questionable, the *case reduces itself to the bare claim that it is unconstitutional to require voter approval of any kind of federal aid however large the consequent burden and far-reaching the effects, unless voter approval is required for all other federal aid, however slight or insignificant. This is simply an assault on a structure of government.* A state's determination of how to distribute state power among its governmental organs is a matter not justiciable in a

federal court, *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937); *Hughes v. Superior Court*, 339 U.S. 460, 466-7 (1950). State sovereignty stems from the people, and they may retain all or any part in their own hands. *Pacific Tel. Co. v. Oregon*, 223 U.S. 118 (1912). Since the burden of public housing falls financially and environmentally on the local citizenry, the people of California reserve to themselves that part of the sovereignty covering the determination whether to accept the offer of federal aid. While a "legislative structure which otherwise would violate the Fourteenth Amendment is not immunized by referendum" and constitutional restraints on the sovereignty of states applies as much when that sovereignty is exercised by the people as by a legislature, *Hunter v. Erickson*, 393 U.S. 385 (1969), neither principle applies here. *Nothing is here claimed to violate the Fourteenth Amendment but the provision for referendum itself.*

The subject matter of "equal protection" is the impact of law on the citizenry; the question asked is whether the law lashes one more than another or gives privileges to one and not another, where both are in like position. *But the district court asks a radically different question:* Conceiving of society as composed of contesting pressure groups, it asks whether the machinery of government makes it more difficult for one group to obtain advantages from the state than another. But by its very nature the democratic process makes it less possible for a small group than a large to obtain its wishes, for it numbers fewer voters. The "equal protection" clause cannot be a mandate to courts to analyze different forms of governmental structure to determine which is more likely to be equally attuned to the demands of all groups. If apportioning state sovereignty *via* the referendum makes it more difficult for a particular group to obtain advantages, that apportionment is not constitutionally vulnerable, at least so long as it is based on neutral principles and not to achieve racial discrimination. *Spaulding v. Blair*, 403 F.2d 862 (4 Cir. 1968);

Ranjel v. City of Lansing, 417 F.2d 321 (6 Cir. 1969) cert. den. 397 U.S. 980, *Southern Alameda Spanish Speaking Organization v. City of Union City, Cal.*, 424 F.2d 291 (9 Cir. 1970).

If the equal protection clause permits inquiry into whether the machinery of government makes it more difficult for one "group" to obtain advantages than another, at least the "groups" should exist in reality and not merely as theoretical constructs, and they should be pin-pointed. If the construct of a group called "the poor" is warranted, still there is no "group" advantaged by "highways", "hospitals" or any of the other federal-aid programs referred to in the opinion below. These benefit the whole of the social organism. That is also true of housing, and it is for that reason that housing legislation is constitutional. *Berman v. Parker*, 348 U.S. 26 (1954); *Housing Authority v. Dockweiler*, 14 Cal. 2d 497, 94 P.2d 794 (1939).

The democratic process is not one of scientific precision but of experience and an experiment. *Sailors v. Kent Board of Education*, 387 U.S. 105, 109, (1967); Brandeis, J., dissenting in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932). People become aroused by, and legislate about, specifics, not theoretical wholes. If "equal protection" were interpreted to require them to refrain from acting unless they devise an all-inclusive body of legislation covering all situations acute minds might later think to be similar, the democratic process could not function at all.

The initiative and referendum, like the equal protection clause before them, was born of a surge of democracy to curb the entrenched and powerful. Yet now the referendum is attacked as disadvantaging the disadvantaged! The animating spirit of the attack is a distrust of the wisdom and fairness of the voter. Surely, one product of the democratic surge, equal protection, cannot be used to destroy the other, the final authority of the voter.

ARGUMENT

It is our submission that the court below has embraced the very usage of the 14th Amendment outmoded in the 1930's and warned against in *Dandridge v. William,* 397 U.S. 471, 484 (1970), to strike down state policies incompatible with its own outlook, albeit from a different direction. And, as shown at pp. 58-60, *infra,* the decision conflicts with the principles recently applied by the Fourth Circuit in *Spaulding v. Blair,* 403 F.2d 862 (1968), by the Sixth Circuit in *Ranjel v. City of Lansing,* 417 F.2d 321 (1969), cert. den. 397 U.S. 980, and by the Ninth Circuit in *Southern Alameda Span. Spg. Org. v. City of Union City, California,* 424 F.2d 291 (1970).

Indeed, the assault on Article XXXIV is a manifestation of a new distrust of democrary and democratic processes in favor of an elitism that considers itself a wiser guide for the solution of the economic and social problems of the republic, an elitism contemptuous of the wisdom and fairness of ordinary voter. This distrust is not only disturbing, it is paradoxical, for it seizes on the egalitarianism of the "equal protection clause" to denounce a democratic process as unconstitutional.

I. The Case Below Was Essentially a Feigned Case, with Dubious Standing of Plaintiffs to Sue, and Improperly Disposed of on Summary Judgment.

The case was decided without trial, on a motion for summary judgment, essentially on self-serving affidavits, without thorough opposition and pretending to be a suit of those whose standing to sue is, to say the least, dubious.

The criteria of standing to sue have been in change and flux, but we think that no decision of this Court and no articulation by it has yet gone so far as to recognize standing in plaintiffs here. *Flast v. Cohen,* 392 U.S. 83 (1968) dealt with standing in a taxpayer's suit, and *Data Processing Service v. Camp,* 397 U.S. 150 (1970) recognized standing in one competitor to challenge action benefiting another competitor. In *Data Processing,* the

opinion of the Court quotes *Flast* as relating the question of standing to "whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution" and turns the decision on an affirmative answer to the question "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise" (pp. 151-2). In *Barlow v. Collins*, 397 U.S. 159 (1970), tenant farmers were held to have standing to challenge an administrative regulation impairing the power to assign certain federal payments as security to finance the making of crops, because the regulation injured the tenant's economic relation to their landlords. The Court's opinion rested its decision on the fact that in the context of the litigation the tenant farmers "have the personal stake and interest that impart the concrete adverseness required by Article III [of the Constitution]" (p. 164) and were within the "zone of interests" to be protected by the Constitution or statutory provisions invoked. The opinion of Mr. Justice Brennan, urging an even more liberal criterion for standing, refers to the discussion in *Baker v. Carr*, 369 U.S. 186 (1962), relates standing to "justiciability", notes that other elements of justiciability are "ripeness" and "the policy against friendly or collusive suits" (p. 171), and urges that the objectives of the

> "standing requirements are simple: the avoidance of any use of a 'federal court as a forum [for the airing of] generalized grievances about the conduct of government,' and the creation of a judicial context in which 'the questions will be framed with the necessary specificity, . . . the issues . . . contested with the necessary adverseness and . . . the litigation . . . pursued with the necessary vigor to assure that the . . . challenge will be made in a form traditionally thought to be capable of judicial resolution."[12]

12. Standing is thus related to the policies against the rendition of advisory opinions or the entertainment of litigation that is not really contested. *State Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945) *Texas v. ICC*, 258 U.S. 158 (1922); *Giles v. Harris*, 189 U.S. 475, 486 (1903); *C&S Airlines v. Waterman Corp.*, 330 U.S. 103 (1948); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); *Muskrat v. United States*, 219 U.S. 346, 354 (1911).

None of these elements is here present. Here plaintiffs alleged only that they "are on the waiting list for placement through the Housing Authority of the City of San Jose and have been on said list for more than one year." (Complt. ¶ 4; A. 3). The court below recognizes in its opinion (A. 170) that plaintiffs

> "cannot of course demonstrate that any particular named plaintiff would be able to occupy new housing if such housing were built."

The possibility that plaintiffs would "occupy new housing if such housing were built" becomes tenuous to the point of non-reality in the factual context of the low-income housing needs of the City of San Jose. Under contract with the City, Kaiser Engineers made a study of those needs and concluded that most of the "families" eligible for public housing were so small that what should be supplied was no-bedroom or one-bedroom apartments: "The most serious unmet need is in the smaller units with no bedrooms (studio apartments) and one bedroom."[13] Presumably the City of San Jose, were it freed from voter veto to provide public housing, would direct that housing where most needed. If so, large families like plaintiffs would not be the beneficiaries, and plaintiffs cannot speak for others, *McCabe v. A.T.&S.F. Ry. Co.*, 235 U.S. 151, 162 (1914), approved in *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

Self-evidently, plaintiffs are not even the moving force in the suit; their names have been conscripted by counsel interested in obtaining an advisory opinion serviceable to their social views.

Assuming that this fact still insures the necessary zeal on the one side of the case, *there has been no such zeal on the other.* Cf. *United States v. Johnson*, 319 U.S. 302 (1943). As we have

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13. Kaiser Engineers, Housing Study, Phase I—public housing for City of San Jose, California, March 1970, p. V-17; and Section V, particularly sub-chapter C and Tables 13 and 14.

seen, this case (*Valtierra v. Housing Authority of San Jose*) was consolidated below with *Hayes v. Housing Authority of San Mateo,* and there the defendants defaulted. Since the principal opposition to the adoption of Article XXXIV came from housing authorities, (see p. 11 supra) a housing authority as defendant is the most unlikely party to endeavor to sustain Article XXXIV against attack. In the *Valtierra* case, one group of defendants, the Housing Authority of San Jose and its personnel, freely admitted the averments of the complaint, including many conclusory ones, and have not appealed. The other group—the members of the City Council—put up an indifferent opposition to the motion for summary judgment (See pp. 13, 15 supra). Considering that they had proposed the housing project, the City Council was not an ideal group to defend rejection of that project by the electorate.

True enough, in this Court appellant Shaffer, through separate counsel, now earnestly opposes the judgment of the court below. But the fact remains that the case was decided below on a sketchy record, on summary judgment, in consequence of which *the opinion rests on statements of assumed fact that simply are not so.*

For example, believing it supportive of the decision rendered, the court below states in its opinion (A. 170) that only 52% of low-income housing units submitted to the voters throughout California in the first 18 years during which Article XXXIV has been in effect were approved. This conclusion was attributed to document entitled "Public Housing Referenda Thru June 14, 1968" and footnoted "Source: California Department of Housing and Community Development, August 8, 1968."[14] What the document actually shows is that, while 52% of the housing *units* proposed were approved by the voters, there were 127 referenda

14. This document was appended to plaintiffs' "Memorandum of Points and Authorities in Support of Complaint for Declaratory and Injunctive Relief," which was filed with the complaint and appears at A. 34 et seq. We question whether it is properly part of the record, but do not dispute its statistics.

and 69% of the *elections* resulted in votes favorable to the project.[15]

Moreover, the statistics were already out-of-date when relied on. Subsequent to June 14, 1968, there were 19 more housing projects submitted to voters in California, and 16, or 84%, were approved. The 19 projects involved 9,290 units, and the 16 approvals covered 6,690 or 72%. All this is shown by a document dated June, 1970, entitled Public Housing Referenda, supplied by the San Francisco Regional Office Area of the Department of Housing and Urban Development and listing all low-income housing referenda in California since 1950. The disapproval by the electorate in San Jose was one of the three.[16] The voters of major areas like San Francisco, Sacramento and Santa Barbara approved the projects submitted to them.

Still further, material before the court below and inconsistent with its view of the facts was not even called to its attention. Docket item 29 in the District Court (noted at A. 75) is a first draft of a report entitled "The Housing Situation: 1969, Santa Clara County". That draft states (at p. 87) that "the San Jose vote * * * was the *only* defeat of 8 public housing ballots in the state at that time", the election of November 1968. The final edition of this same report corrects this sentence to read (pp. 70, 71): "The San Jose vote * * * was the only defeat of 11 public housing ballots in the state at that time".

Thus the assumption that the electorate votes against low-income housing or that Article XXXIV is a roadblock to the poor *is false. As the need of public housing has increased,* the public has responded by an increasing percentage of favorable votes. Mistrust of the democratic process has not been warranted.

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15. The disparity between the number of successful elections and the number of approved units is in part at least due to the rejection of a monstrous proposal in Los Angeles for 10,000 units.

16. Another of the three was Fresno, which explains why plaintiffs went to a Fresno housing authority official for an affidavit (A. 21), a highly selective presentation of argument in affidavit form.

Another example of how the District Court was misled by failure of truly adversary presentation is to be found in its reliance on a fictitious racial factor. Speaking of *Hayes v. Housing Authority of San Mateo,* in which defendants defaulted, the court commented that the "poor persons" who there sued were "predominantly Negro" (A. 170), and the opinion embraces the argument that "low-income projects * * * will be predominantly occupied by Negro or other minority groups" (A. 174). *But the statistics as to San Jose and Santa Clara County are quite otherwise.* In 1966 the Santa Clara County Planning Board took a special census and updated it in 1969. According to this census, only 1.4% of households of an income of $3,000 or less are Negro, and 88.1% are white (excluding Mexican Americans).[17] Coupled with data in the record,[18] these figures demonstrate that the poor Negroes and Mexican-Americans constitute the same proportion of all poor as Negroes and Mexicans of all economic levels constitute of the total population. *Thus poverty does not equal race in San Jose or Santa Clara County:* the racial minority groups are no poorer than the population as a whole.

Other examples of inadequate data before the court below will appear throughout this brief.

If this case involved private interests alone and were truly an adversary contest, failure of defendants to respond to the motion for summary judgment adequately might possibly preclude reliance in this Court on matter not in the record. *But this is not a*

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17. The foregoing appears in "Info., County of Santa Clara Planning Department, 70 W. Hedding St., San Jose, California 95110, Economics, September, 1969, pp. 344, 345." It is repeated in a report prepared by Kaiser Engineers of Oakland, California, under contract between the City of San Jose and Kaiser Engineers, dated January 21, 1970, entitled Housing Study, Phase I—Public Housing, for City of San Jose, California, Report No. 70-10-R, March 1970, transmitted to the City under date of March 13, 1970.

18. The record contains an affidavit of Mr. Tyr V. Johnson, Commissioner of the Housing Authority of Santa Clara County, which states that Negroes constitute but slightly more than 1% of the population of the County and Mexican-Americans about 9.5% (A. 31 at 32).

private controversy. It involves the very factor which lies behind the direct appeal from a judgment of a three-judge court—"procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy", *Phillips v. United States*, 312 U.S. 246, 251 (1941).

In short, the judgment below issued as a pure advisory opinion outside the context of any real Article III "case or controversy". It outlawed Article XXXIV of the California Constitution as a bare metaphysical abstraction divorced from the stuff of reality.

II. Article XXXIV, California Constitution, Does Not Violate the Equal Protection Clause.

A. THE CASE IS UNLIKE HUNTER V. ERICKSON AND REITMAN V. MULKEY, THERE ARE NO RACIAL ELEMENTS.

This case is unlike *Hunter v. Erickson,* 393 U.S. 385 (1969). There the City of Akron had a housing ordinance, enacted by its City Council, prohibiting discrimination on the basis of "race, color, religion, ancestry, or national origin", and the ordinance set up machinery to enforce its anti-discrimination provisions. The city charter was then altered by initiative for the express purpose of creating a racial classification. The charter amendment provided that any ordinance regulating use, sale, lease or other handling of real property "on the basis of race, color, religion, national origin or ancestry" required the approval of the electors before it could take effect. The charter not only repealed a fair housing ordinance aimed at racial discrimination, and deprived plaintiff of an existing cause of action for discrimination, but it set up a classification based on race. In the words used by this Court to distinguish the situation, "there was an explicitly racial classification treating racial housing matters differently from other racial and housing matters" (p. 389).

Nor is this case like *Reitman v. Mulkey,* 387 U.S. 369 (1967),[19] in which the initiative provision also went farther than mere repeal of state anti-racial discrimination legislation. This Court there relied upon a construction by the Supreme Court of the State,

19. Not cited below but cited in *Hunter v. Erickson.*

binding on this Court, that the intent of the initiative amendment was to create a constitutional right to discriminate on racial grounds (387 U.S. at 376).

In *Southern Alameda Span. Spg. Org. v. City of Union City, Cal.*, 424 F.2d 291 (9th Cir., 1970), the court pointed out that in *Reitman v. Mulkey*,

> "The only 'conceivable purpose' [of the provision held to be unconstitutional], judged by wholly objective standards, was to restore the right to discriminate and protect it against future legislative limitation." (p. 295)

B. ARTICLE XXXIV HAS NO INVIDIOUS PURPOSE, LEGITIMATE REASONS MOTIVATED ITS ADOPTION, AND LEGITIMATE REASONS MOTIVATE VOTER TREATMENT OF HOUSING PROJECTS.

The *Hunter* and *Reitman* cases and this case are poles apart. Article XXXIV repeals nothing, it is not expressed in terms of race or discrimination, it had no unconstitutional motive, and it has no unconstitutional effect. It is *neutral*. Its sole purpose and effect are to reserve to the people in a community the right to determine whether a proposed housing project (a) is desirable and (b) justifies the financial burden. We briefly review (a) the effect, and (b) the motive or purpose.

1. Effect

We have just seen (at pp. 28, 29 supra) that the voters have exercised their power in *favor of—not against*—the project on over 2/3 of the occasions presented to them, and that in the last two years they have approved 84% of the projects, involving 72% of the proposed units. California has taken pride in the success of school bond issues, as a "high tribute to the traditional regard in which Californians have had for education"; yet from 1954 to 1969 only 75% of school bond issues passed.[20]

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20. A California Assembly Interim Committee on Revenue and Taxation, in a report "Taxation of Property in California", Dec. 1969, commented that "California voters have approved 75 percent of the bond issues brought to a vote since 1954-1955, a high tribute to the traditional regard in which Californians have had education". The taxpayers' revolt has greatly reduced that figure since then.

2. Motive or Purpose of Article XXXIV of the California Constitution

Summary judgment is improper where issues of motive or purpose are relevant, *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 500 (1969). Therefore, no unconstitutional or improper motive can be assumed to have animated the adoption of Article XXXIV or voter action under it, and, in fact, the record is overwhelmingly clear as to the legitimacy of the motives.

As we have seen (pp. 8-11, supra), the reasons presented to the voters in favor of adoption of Article XXXIV in 1950 had nothing to do with race or poverty. They were exclusively (a) fiscal and (b) political.

(a) *Fiscal considerations:*

Almost from its beginning, public policy in California has insisted that major public indebtedness may not be incurred without approval by the voters; it has insisted that fiscal control be in the voters' hands. Thus the State Constitution provides that no city, county or school district shall incur an indebtedness or liability in any manner exceeding the income of that government for one year except with the consent of the voters at an election. (Art. XI, Sec. 18). This restriction was added at the Constitutional Convention of 1879 because of a groundswell of public demand produced by excessive municipal indebtedness and numerous defaulted bond issues.[21]

This history is detailed at much length in *Westbrook v. Mihaly, as Registrar of Voters*, 2 Cal. 3rd 765 (June 30, 1970).[21a] There the

21. See, for example, Van Alstyne, Arvo, "Background Study Relating to Article XI: Local Government," Calif. Constitution Revision Commission.

21a. *Westbrook* declares a requirement that the approval be by ⅔rds vote unconstitutional but still requires a majority vote.

opinion notes that the California Constitution of 1849 required any state indebtedness in excess of $300,000 to be approved in a statewide referendum (Cal. Const. of 1849, Art. VIII), and that many charter cities required elections before indebtedness could be incurred.

> "The bubble burst in the 1870's as California followed the rest of the nation into a severe financial depression. * * * It was thus in an atmosphere of economic and political crises that the delegates to the Constitutional Convention set to work in 1878.
>
> "A combination of state and local mismanagement, aggravated by the depression, had created widespread concern over excessive municipal indebtedness and the processes of local debt formation." (pp. 775-6)
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> * * * *
>
> "It is also apparent that Article XI, section 18 [of the present constitution, adopted in 1879] was intended to compel local legislative bodies to inform the public of projects necessitating long term expenditures and to give to the people the ultimate power of approving or rejecting them." (p. 776-7)

As these state constitutional controls have from time to time over the years been eluded because the words of the 1879 constitution did not fit new or ingenious devices, the public has enacted measures to preserve or regain its controls. In *Housing Authority v. Dockweiler*, 14 Cal.2d 437, 94 P.2d 794 (1939), it was held that a housing authority, although a public corporation, was not a "city or county" and therefore could incur indebtedness not subject to Article XI, Sec. 18. *It was to rectify this erosion with respect to low rent public housing projects that Article XXXIV was sponsored and adopted—not to create a special procedure for housing but to bring housing within the traditional controls.*

Appellees have asserted (e.g., in their motion to dismiss in No. 154) that "No local funds are used; the cost of the program is borne completely by the federal government and by the tenants

of the housing units." This is either naive or uncandid; in any event, it is erroneous. Low rent housing projects are constructed through 40-year bonds issued by the local housing authority. Although the federal government contracts to make annual contributions sufficient to pay interest and principal, the local governing body must contract to provide all municipal services for the 40 years and to waive all taxes, receiving in lieu 10% of the rentals, and the rentals are, of course, purposefully and artificially low. Among the local services to be supplied are schools, police and fire protection, streets, sewers, drains, lighting.

In consequence, the financial burden on the locality comes to 60% of what the normal tax receipts from the property would be, even on values calculated at the low rental basis. The well-known and esteemed Commonwealth Club of California, in its analysis of proposed Article XXXIV, concluded and stated in 1950 that "it is expected that value of the contributions which localities make by foregoing full ad valorem taxes on the projects occupied by low-income families, less in lieu payments which are received, will approximate 50% of the federal contribution over the life of the project."[22] Inasmuch as property tax rates have risen drastically since 1950 in march with the higher costs of providing municipal services, the burden upon the local community is now considerably greater. Literature from federal agencies and public housing agencies today refrains from making any estimate of local sharing.

(b) *Non-fiscal considerations:*

In addition to fiscal control, there is another basic reason, unrelated to race or poverty, why voters should have the final word—the fundamental policy of California about the supremacy of referendum (Cal. Const., Art. IV, Sec. 1; see p. 6 supra).

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22. *The Commonwealth*, Commonwealth Club of California, October 9, 1950.

Article XXXIV reassured the voters of that final word over low-income housing after court decision declared it absent on what, to the voters, was word-play about "legislative", "administrative", and "executive" (pp. 6, 7 supra). And in addition to the fiscal, there are many reasons, having nothing to do with race or poverty, why local voters might disapprove a particular housing project presented to them. No person knowledgeable in housing and sociology will say, in A.D. 1970, after years of experience, that public housing is necessarily desirable or good for minority groups or for those of low income. The issues are far more subtle. Spokesmen for the poor and for minority groups increasingly reject public housing. Whether rightly or wrongly we do not say; that is a matter on which courts may take no position. ***But the reasons for rejection are legitimate questions to be put directly to the voters of a community.***

Just recently the Kerner Commission (National Advisory Commission on Civil Disorders) said in its report (Bantam ed. 1968, at p. 478), that federal policies have dictated that most housing projects "be of ***institutional design and mammoth*** size". Yet many sound thinkers object to "institutional design" and to "mammoth size" as psychologically debilitating and sociologically oppressive. They create problems in city planning, redevelopment and zoning. Voters may object to them on esthetic grounds or upon the ground that such projects tend to perpetuate rather than overcome racial segregation, or upon the ground that large concentrations of low-income housing creates a major change in the environment, a creation of a "central city" divorced from its surroundings. The Kerner report (p. 474) observes:

> "Federal housing programs must be given a new thrust aimed at overcoming the prevailing patterns of racial segregation. If this is not done, those programs will continue to concentrate the most impoverished and dependent segments of the population into the central-city ghettos where there is already a critical gap between the needs of the population and

the public resources to deal with them. This can only continue to compound the conditions of failure and hopelessness which lead to crime, civil disorder and social disorganization."

The United States Department of Housing and Urban Development has said:[23]

"Between 1937 and 1965, [Local Housing Authorities] provided low-rent housing primarily by new construction. By the 1960's, however, it was clear that new construction alone could not meet the tremendous need for decent housing at low rents . . . . *Clear too was the fact that housing developments in which all the occupants are at or near the poverty level do not make the most satisfactory environment for all low-income people.*"

"To meet changing conditions, new methods were needed."

The President's Committee on Urban Housing has written:[24]

"Since a slum is defined not only by dilapidation but also by exclusion and negation, one must pay attention to location and to mixtures of groups and income levels. Subsidized low-income housing should not be concentrated in the present slums but scattered throughout the metropolitan areas. Such housing should not be built in great aggregates but in smaller collections of units. The excessive concentration of people of one narrow income level or age or race in one area should be avoided."

A report by George Schermer Associates, "More Than Shelter, Social Needs in Low- and Moderate-Income Housing", prepared

23. HUD, Housing For Low Incomes Families, p. 5 (1967).

24. Report of The President's Committee on Urban Housing, A Decent Home, p. 48 (December 11, 1968); U.S. Gov't. Printing Office: 1969 0-313-937. While the complaint in the present case alleges that the housing project submitted by the San Jose City Council to the voters proposed to disperse the units, the judgment below is not limited to San Jose. It outlaws Article XXXIV throughout the State. The passages quoted above show the variety of considerations an electorate may legitimately consider.

for the consideration of the National Commission on Urban Problems[25] contains among its principal conclusions the following:

> "6. Public housing has made little contribution toward the development of a sense of community among its own tenants or between tenants and the surrounding neighborhood. The formula for conventional public housing has been inherently anti-community. However, some of the new approaches to public housing may remedy this deficiency." (p. vi)

And it amplified (p. 56):

> "On the basis of these tests, it can be said that until very recently, the several elements of the national housing program tended to be destructive of community, especially with respect to low-income people and the central areas of the city.
>
> * * *
>
> "The conventional public housing formula has been too rigid. Public housing was a mechanistic rather than a humanistic program. It attempted to force people into compartmentalized modes of living quite unrelated to human needs and desires." (p. 64)

In short, public housing can have major sociological effects. *Voters are entitled to a direct voice in decisions which alter the characteristics of their very environment for generations.* Votes for or against a particular project find explanation in a multitude of reasons.

3. Article XXXIV Is No Bar to Adequate Low-Cost Housing.

Appellees' motion to affirm in No. 154 (at p. 6) purports to give statistics that with "8% of the nation's poor, California has only 4% of the low income housing units" and has constructed fewer "low income units per 1000 low income family groups"

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25. Research Report No. 8, Washington, D.C. 1968; U.S. Government Printing Office: 1968 0-321-640.

than other states like New York. If questions like these are relevant at all to the issues in the case, there should be a plenary trial in which a complete and factual basis for a constitutional determination can be made. These supposed statistics are no part of the record; they were merely asserted in an appendix to the complaint without any effort at authentication (A. 38). *And they are meretricious.* Is it being insinuated that the poor of California are not as well housed as the poor elsewhere? Is it being suggested that "low income" housing under the Housing Act of 1937 is the only housing for the poor? This kind of argument illustrates the vice of a summary judgment.

There are enough facts of which judicial notice is available to indicate that the insinuations are unsound, both as to housing for the poor elsewhere than California and the availability of other kinds of housing for the poor in California. Thus, despite the greater number of units of low income housing per 1000 constructed in New York, primarily in New York City, housing there is in crucial shortage because numerous units have become wholly uninhabitable.[26]

Moreover, other federal housing programs, conceived much later than the Housing Act of 1937, offer significant alternatives to institutional housing projects and are hailed as vastly superior. One reason the electorate might disapprove a public housing project may be to deny to the housing authority the option of choosing the easy, immediate, visible but merely symptomatic solution. Rejection of a project forces authorities to face the issues

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26. A statement of Jason R. Nathan, Administrator, Housing and Development Administration, before New York State Housing Committee, November 7, 1969, states that despite New York City's "record breaking publicly-assisted construction" (p. 4) "crisis" or "disaster" is imminent in New York (p. 1) because of "the amount of housing draining out from the bottom of the reservoir", twice as many units being abandoned as constructed (p. 4). Barron's National Business and Financial Weekly, March 16, 1970, states that nearly 100,000 rental units in New York City have become uninhabitable within the last three years. Mr. Nathan states that 500,000 units are on the way out (p. 5).

of curative relief through the use of new approaches. One of them is the leased house-rent subsidy plan.[27]

As stated by the Department of Housing and Community Development of the State of California, the "leasing program provides the machinery by which existing vacant dwellings within a community may be leased by its local housing authority at prevailing rents and then subleased to a low income senior citizen or families at rents within their financial reach."[28] California has a higher proportion of subsidized leased housing than any other state. It has taken the lead in this new form of low income housing thought by many to be more enlightened. "[A]bout one-third of the total leased units for the nation are in California. * * * The impact of the leasing program has been significant in California."[29] For example, the San Jose Housing Authority has nearly 2,000 leased units (Lockfeld Aff., A. 61). Under the leased housing-rent subsidy plan the Housing Authorities lease, for terms up to five years, existing housing in the community—ideally and generally geographically distributed through the community—from private owners and then sub-lease it to families of low-income, providing a subsidy in the rental based on the income of the tenant. About 23,000 of such units were authorized in California (since the inception of the program in late 1965).[30]

Another alternative to the institutional housing project is the rent supplement program.[31] Under that program (12 U.S.C. § 1701s), housing is privately built, owned and managed by non-profit, limited dividend or cooperative organizations with FHA

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27. Provided for by the 1965 Housing and Urban Development Act, Section 23 (42 U.S.C. 1421b); HUD, Housing Assistance Administration, Housing for Low-Income Families (1967); HUD, FHA, The Leasing Program for Low-Income Families (1967).

28. Annual Report, 1969, Department of Housing and Community Development of the State of California, p. 22.

29. Ibid, p. 23.

30. Ibid, p. 22.

31. HUD, The Rent Supplement Program for Low-Income Families (1968)

mortgage financing at market interest rates. Rent supplements are furnished directly by contract between FHA and owner-developer for those tenants who qualify under income standards in the federal law.[32]

Although these alternatives are also administered by local authorities, the Attorney General of California has given his opinion that they do not require voter approval under Article XXXIV of the California Constitution;[33] leased units and privately-owned houses whose tenants receive rent supplements are not developed, constructed, or acquired by the Housing Authority.

Under Section 236 of the National Housing Act, 12 U.S.C. § 1715 z-1, in 1968 a still newer program of direct interest subsidies to lenders on privately constructed homes is authorized for those families of qualifying low-income, to keep monthly payments for housing, including taxes and insurance, to 25% of income.

The Housing Study for San Jose prepared by Kaiser Engineers (see fn. 17 supra) states (p. VIII-2):

> "Most recently the conventional approach has been relegated to the least used and, therefore, lowest priority of all the methods available to a local housing authority. This is true because the conventional approach takes almost twice as long to develop housing than the other methods, it usually results in large monolithic developments so common in the eastern part of the country and known as Public Housing Projects, and it does not make full use of the private sector of the economy."

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32. President Johnson has said of these programs:

> "The most crucial new instrument in our effort to improve the American city is the rent supplement . . . a program of rent supplements for low-income families . . . provides a brand new approach to meet an ancient and long-neglected need."

HUD, "The Rent Supplement Program for Low Income Families". "HUD Fiscal year 1971 Budget shows commitment to Housing", HUD News, Feb. 2, 1970 (HUD-No. 70-48), observes (p. 4) that by the end of 1970 approximately 35,800 units will be supported by rent supplements.

33. 47 Ops.Cal.Atty.Gen. 17 (1966).

The Schermer Report to the National Commission on Urban Problems (see fn. 25, supra) concluded:

> "16. The shelter needs for a large part of the low- and moderate-income population can probably be best served through Federal stimulation of private development on the one hand and a system of Federal cash subsidies to families on the other." (p. viii)

The Report of The President's Committee on Urban Housing, A Decent Home (December 1968), observed (p. 69):

> "Full opportunities should be provided under the various programs for the subsidy recipients to own their units, either outright or through cooperatives or condominiums. Many studies have found that ownership is highly correlated with good maintenance and neighborhood stability."

The Constitution is silent on which of these various methods of meeting the need for low-income housing is best. We note the several methods, *not to tender any view of our own that one is better than another, but to say that voters may legitimately think so, wholly divorced from racial prejudices, and it is reasonable to let them be heard at the polls.* Voters may well believe, on grounds unrelated to race or poverty, that other programs are more eligible from the standpoint of public and community interest than a conventional public housing project, and therefore exercise their right under Article XXXIV to disapprove such a project.[34] And there is not a scrap of evidence in the record to suggest that reasons of race and poverty have entered into the adoption of Article XXXIV or the action taken by the electorate under it.

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34. There were statements in plaintiff's written material below that the leased housing-rent subsidy and the rent supplement programs are not capable of caring for the housing situation in San Jose. There are three answers: (1) The decision goes beyond San Jose; it outlaws Article XXXIV everywhere. (2) If the fact is constitutionally relevant, it should have been subjected to plenary trial, not taken cavalierly on summary judgment. (3) The voters may think differently from officials of the Housing Authority; the "equal protection clause" is not an instrument by which the courts may review and revise the judgment of the electorate.

In sum, Article XXXIV *is a wholly neutral provision* which bears no resemblance in purpose or effect to the measures struck down in *Reitman v. Mulkey* and *Hunter v. Erickson.*

C. THE EQUAL PROTECTION CLAUSE DOES NOT PRECLUDE REASONABLE CLASSIFICATION. ARTICLE XXXIV MAKES NO CLASSIFICATION ON THE BASIS EITHER OF RACE OR POVERTY.

Classifications based on race are "constitutionally suspect," *Hunter v. Erickson,* 393 U.S. 385, 392 (1969), and cases there cited. There is no such classification here. Apart from racial classification, a state created category is not in violation of the 14th Amendment if any set of facts can be rationally conceived to support it. *E.g., McDonald v. Board of Election,* 394 U.S. 802, 808-09 (1969); *McGowan v. Maryland,* 366 U.S. 420, 425-26 (1961); *Dandridge v. Williams,* 397 U.S. 471, 485 (1970). One who complains of a violation of the Equal Protection Clause must at least show that someone *comparably situated* has been treated differently. *National Union v. Arnold,* 348 U.S. 37, 41 (1954).

Appellees would place poverty in the same category as race as a suspect classification under the Equal Protection Clause. At this point it is necessary to replace words by thought. While laws may not deprive the poor of basic rights of citizens, such as the right to move from state to state,[35] or the right to vote,[36] it is a fact of life that indigency is a social, economic and political situation to which government must give its attention, or at least rightfully may do so. And to do so is not to discriminate unconstitutionally. In turning its attention to this subject, a State has wide freedom to determine what it should do and how it should do it. In permitting classification, the Equal Protection Clause allows the lawmaker to single out the need to be served or the "evil" to be eradicated and to legislate about *that* need or "evil" without requiring like treatment of other matters outside the area. As

35. *Shapiro v. Thompson,* 394 U.S. 618 (1969); *Edwards v. California,* 314 U.S. 160 (1941).

36. *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966), the poll tax case.

Mr. Justice Holmes said in *Patsone v. Pennsylvania,* 232 U.S. 138, 144 (1914), "A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience."

Directing legislation to the problem of poverty is not classification on the basis of poverty.

Any measure or program for dealing with public welfare assistance raises debatable economic, social, or philosophical problems, and no program may be ideal. But these problems are not solvable by the Constitution, *Dandridge v. Williams,* supra, at 487. "Classification" is not to be measured by an apothecary's scales. *Lindsley v. National Carbonic Gas Co.,* 220 U.S. 61, 78.[37]

Article XXXIV of the California Constitution does *not* in fact make a classification on the basis of poverty. To be sure, it does, by its terms, apply only to a "low rent housing project" "for persons of low income". But to leap from that fact to a conclusion that it classifies people on the basis of poverty is quite impermissible.

With minor exceptions California treats *all* kinds of public housing alike. As stipulated, the only kind of housing any governmental agency in California provides, other than the housing to which Article XXXIV applies, is housing for state officials and university personnel (A. 69, 70).[38] Different treatment of housing assistance between employees of the State and all other persons is obviously a permissible classification. In short, Article XXXIV requires voter approval for *all* public housing projects sponsored

37. On this very principle the Supreme Court of California upheld the Unruh Act's prohibition of racial discrimination in the sale and rental of certain but not all kinds of property, *Burks v. Poppy Construction Co.,* 57 C.2d 463, 370 P.2d 313. Said it: "A statute need not operate uniformly with respect to persons or things which differ in relevant aspects, and a classification will be upheld where it has a substantial relation to a legitimate object to the accomplished." (p. 475)

38. Another category consists of houses acquired as an incident to the exercise of eminent domain, which the public authority disposes of as rapidly as it can—obviously a peculiar category all its own.

by the State or its agencies and makes no classification of people for that purpose on any basis.

To say that Article XXXIV discriminates on the basis of poverty *because its subject matter is housing for persons of low income* simply ignores the fact that the only concern the State has with supplying housing is to supply it to persons of low income. There may be a *moral* duty to provide housing for those economically disadvantaged, or it may be prudent to do so so as a prophylactic against social upheaval. But the Constitution imposes no command to do so, and therefore the Constitution imposes no command as to how the State is to go about determining when and if it shall do so. The subject of publicly supported housing is a subject by itself, and of its very nature it concerns those of low income.

The Equal Protection Clause does not even begin to be involved in a situation unless the State enactment actually classifies people and treats them differently. When the State Act does not do that but, instead, only focuses on one problem there is no equal protection question. The venerable case of *Barbier v. Connolly*, 113 U.S. 27, 32 (1885) says this:

> "Class legislation, discriminating against some and favoring others, is prohibited, *but legislation which, in carrying out a public purpose, is limited in its application,* if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

D. BECAUSE THERE IS NO CLAIM OF DISCRIMINATION WITHIN THE AREA OF HOUSING AND NO GROUP IS TREATED DIFFERENTLY FROM ANY OTHER WITH RESPECT TO HOUSING, THE DISTRICT COURT HAD TO POSIT A ~~CONTRAST~~ WITH OTHER FEDERAL AID PROGRAMS—SPECIFICALLY, HIGHWAYS, URBAN RENEWAL, HOSPITALS, EDUCATION, LAW ENFORCEMENT ASSISTANCE, AND MODEL CITIES. THAT CONTRAST IS SPECIOUS, SUPERFICIAL, AND BARE ASSERTION.

There is no claim that others are treated better than the poor with respect to public housing. It was stipulated that housing for rental to persons of low income is the only kind of public housing in California, except for homes for state officials and the like

(p. 44, *supra*). In order to find some basis for a claim of unequal protection, it was necessary to look elsewhere.

The core of the decision below appears to be the assertion (A. 176) that Article XXXIV makes it more difficult to obtain federal aid for housing than for highways, urban renewal, hospitals, education, law enforcement assistance, and model cities. It would seem that the assault on Article XXXIV as unconstitutional was first reached and then followed by a hasty casting-about to find something against which to measure inequality of treatment. The contrast is simply not well made.

In the first place, classification of housing different from the matters referred to may be a classification different in kinds of public expenditure, but it is no distinction based on any forbidden criterion.

In the second place, the reference to other federal aid is a cursory one without citation of statutes and without a word in the record showing what the other programs may be, when they came into being, how they operate, what aid the federal government offers, or how or when California has responded to the offers of aid. There is not a word of analysis to show such likeness in any rational aspect as to require identity of treatment. If a declaration of unconstitutionality is to be based on such matters, it would seem plainly necessary to explore the nature of these things as a basis for comparison. The opinion contains no such exploration. But lack of similarity in vital respects is plain on the face of the relevant statutes upon any inspection.

To review the various federal assistance programs in detail would be endlessly tedious. They vary so widely that the Congress itself could be accused of "unequal protection", in violation of the 5th Amendment,[39] in its offers of assistance were there any merit in the effort to import "unequal protection" into the subject.

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39. The 5th Amendment imposes the same equal protection constraints on the federal government as the 14th Amendment imposes on the States, *Bolling v. Sharpe*, 347 U.S. 497 (1954).

Most of the federal-aid programs referred to in the opinion of the court below *did not even exist until after Article XXXIV was adopted—most of them long after.* They were created by Congress later—highways, 1958[40]; some of the hospital aid, 1963[41]; education, 1965[42]; law enforcement, 1968[43]; model cities, 1966[44]. Only some partial provision for aid to urban renewal[45] and for some to hospitals[46] antedates the adoption of Article XXXIV. If a state statute or constitutional provision which does *not* deny equal protection when adopted, *because at that time nothing exists against which it can be said to discriminate,* how can it be rendered unconstitutional because the federal government later creates new programs of assistance and offers them to the states or the state later first provides for response to the offer? In *Carter v. Jury Commission,* 396 U.S. 320 (1970), rejecting a claim of unequal protection, the Court said (p. 336):

> "Its antecedents are of ancient vintage, and there is no suggestion that the law was originally adopted or subsequently carried forward for the purpose of fostering racial discrimination."

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40. Federal-Aid Highway Act, 23 U.S.C. § 101 et seq., as amended Pub. Law 85-767, 72 Stat. 885.

41. Mental Retardation Facilities Construction Act, 42 U.S.C. § 2661 et seq.

42. Higher Education Act of 1965, 20 U.S.C., 1001 et seq.; Assistance to Local Educational Agencies for the Education of Children of Low Income Families, 20 U.S.C. § 241a et seq.; Grants to Strengthen State Departments of Education, 20 U.S.C. § 861 et seq.

43. Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3711.

44. Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. § 3301 et seq.

45. Housing Act of 1949, 42 U.S.C. § 1450, 63 Stat. 413, Act of July 15, 1949. Not until 1954 was the subchapter on urban renewal added, Act of Aug. 2, 1954 c. 649; 42 U.S.C. § 1450.

46. 42 U.S.C. § 291 et seq., based on Act of Aug. 13, 1946, c. 958, § 2, 60 stat. 1041.

Urban renewal may be disposed of briefly. Not until 1951—the year after Article XXXIV was adopted—did California even adopt legislation responding to the federal offer (Community Redevelopment Law, Stats. 1951, ch. 710). The problems of urban renewal are so peculiar and complex that California's participation takes 110 pages in its statutes to describe and regulate (Cal. Health Safety Code, §§ 33,000 to 34,014).

The court below was grossly misled in assuming that urban renewal is free of voter control. The federal statute itself requires approval "by resolution or ordinance of the governing bodies of the affected communities" (20 U.S.C. §§ 1451(b), 1455). Urban renewal in a local community is carried out by a local redevelopment agency, which must be created by the local legislative body. To that end there must be a declaration by that legislative body that a redevelopment agency is needed. Cal.H.&S. Code § 33,101 specifically provides that the ordinance of the local legislative body "declaring that there is need for an agency to function in the community shall be *subject to referendum* as prescribed by law for a county or city ordinance." (H.&S. Code, § 33,101). *Thus the local electorate does have its voice.* The agency must prepare a redevelopment plan, and this must be approved by ordinance of the local legislative body (H.&S. Code § 33,365); if the plan requires an expenditure of money, the ordinance must provide for it (H.&S. Code § 33,369). All these determinations are "legislative", *Hunter v. Adams,* 180 Cal.App.2d 511, 517; 4 Cal. Rptr. 776 (1960). Therefore they are subject to referendum under California Constitution, Article IV, § 1. The "community" may raise funds by general obligation bonds to finance the redevelopment (H.&S. Code §§ 33,630 and 33,621), but all such bond issues are expressly required to have voter approval, for H.&S. Code § 33,633 prescribes that they are subjected to all requirements and limitations "provided by law or the charter of the

community for the issuance and authorization of such bonds for public purposes generally." This plainly subjects them to Cal. Const. Art. XI, § 18.[47] If the redevelopment agency issues bonds or borrows money itself, the debt is no charge on, or liability of, the community or burden on the taxpayer (H.&S. Code § 33,644). A plan for "special renewal areas" must have the consent of 60% or more of the persons owning real property in the area (H.&S. Code § 33,717(1). Thus reference to urban renewal as support for the decision below completely collapses, because local participation in urban renewal is as much subject to voter approval as is low-income housing.

Moreover, the court below tacitly made an unsupported and erroneous assumption that no referendum process exists as to the several aid programs adverted to by it (A. 176-7). California has general referendum procedure for all legislation (see p. 6 supra), and Article XXXIV of its Constitution came into being because the California Supreme Court held that decisions relating to low-income housing are "administrative" not "legislative". The opinion below cites no basis for supposing (and we know of none) that the general referendum laws and voter approval requirements do not apply to the other aid programs in vital nodes. For example, in response to the federal offer of aid for model cities, California has merely by a short act authorized cities and counties to participate in the federal program (Government Code § 53,703), and all acts of the cities and counties are, of course, subject to Art. IV, § 1, and Art. XI, § 18 of the California Constitution.

The contrast with federal aid for highways is equally inept. One of the prime motives underlying Article XXXIV was the

47. Article XI, Section 18 in fact requires a two-thirds vote. In *Westbrook v. Mihaly, as Registrar of Voters,* 2 Cal.3rd 765 (June 30, 1970), the Supreme Court of California held that the requirement of a two-thirds vote instead of a majority violated equal protection, but the requirement of voter approval by majority vote stands.

protection of the *local* taxpayer and the preservation of *local* fiscal responsibility. But in California highway programs do *not* involve the local purse; they are borne by the state treasury. The Federal-Aid Highway Act, 23 U.S.C. §§ 101 et seq., as amended (Pub.Law 85-767, 72 Stat. 885), provides for three basic programs, primary systems, secondary systems, and the interstate system (23 U.S.C. § 103(a)). At the state level, the program is handled by a State Highway Department (23 U.S.C. § 105). Only the secondary system could involve local officials, and, even then, not where all public roads are under control of a State Highway Department (§ 105b). In California, under the Secondary Highways Act of 1951 (Cal. Streets & Highways Code, §§ 2200 et seq.), all matching funds for federal aid for secondary systems and county highways come from state sources (§§ 2201, 2210.5). That Act declares, "Inasmuch as these county highways are a matter of state concern and many of the counties are financially unable to furnish funds to be used with federal funds as required by federal law, funds should be provided from state sources therefor" (§ 2201).[48]

The principal form of federal aid to higher education is that authorized by 20 U.S.C., Ch. 28. State participation requires creation or designation of a central state agency (20 U.S.C. § 1005), and we find nothing in California statutes requiring local governmental agencies to share the expense of federally-aided programs.

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48. By Stats. of 1969, Ch. 1141, adopted in 1969 after this suit was filed, California adopted the *Urban Area Traffic Operations Improvement Act* (St. & H. Code § 2300 et seq.) to take advantage of 23 U.S.C. § 135 which appropriates federal aid for the relief of congested city streets and county roads. But the federal funds in this program go into the State Highway Fund and are apportioned by the State Highway Department; while counties and cities may have to supply some funds, those funds essentially are taken from moneys first supplied by the state from state taxation (St. & H. Code, § 2324).

As to law enforcement assistance, California has yet to enact legislation governing the manner in which California or its localities may respond to the federal offer of aid.[49]

Indeed, every one of the programs referred to in the opinion below differs sharply from low-income housing aid, because they raise none of the political, sociological or environmental questions that such housing does. Federal aid to hospitals (42 U.S.C. § 291 et seq. and 2661 et seq.) requires a central state agency to administer (in California the State Department of Public Health, Cal. H. & S. Code, § 430 et seq.) and involves relatively small sums, and California puts up matching sums from the state treasury (Cal. H. & S. Code, § 435.6). While the local community defrays some of the costs, it is inconceivable how anyone could find sociological or political objections to better hospitals! Hospitals serve no "group"; they serve the whole public. Indeed, the federal act declares that its purpose is "to assist the several States * * * to furnish adequate hospital, clinic, or similar services *to all their people.*" (42 U.S.C. § 291(a)) *If* any group is more advantaged than another, it is the "poor"; and it cannot be said that California discriminates against the poor because it furnishes some services to them more readily than it supplies them with others.

Similarly, when the federal Student Assistance Program states (20 U.S.C. § 1061a) that the purpose of "educational opportunity grants" is "to assist in making available the benefits of higher education to qualified high school graduates of exceptional financial need, who for lack of financial means of their own or of their families would be unable to obtain such benefits without such aid", it is the "poor" who are aided. Again, the federal Act for "Assistance to Local Educational Agencies for the Education of Children of Low-Income-Families" states (20 U.S.C. § 241a) that

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49. In 1967, before Congress legislated but anticipating that it might, California created a Council on Criminal Justice in the state government to develop plans to fulfill the requirements of any federal act (Stats. 1967, c. 1661, p. 4042; Penal Code, §§ 13,800-13,807). Nothing in this Act exempts anything from Art. IV, Sec. 1 or Art. XI, Sec. 18 of the State Constitution.

it is in "recognition of the special educational needs of children of low-income families" that "Congress hereby declares it to be the policy of the United States to provide financial assistance * * * to local educational agencies serving areas with concentrations of children from low-income families * * *." That, too, is a program for the "poor".

This last term the Court rejected the claim that exemption of church property from taxation (along with non-profit hospitals, art galleries and libraries) violated the Establishment Clause of the First Amendment. *Walz v. Tax Commission,* 397 U.S. 664 (1970). There is no report of any contention by the appellant, a private owner of real estate, that the tax exemption violated the Equal Protection Clause by classifying him differently from the exempted non-profit organizations. But this Court would have been alert to that constitutional bar if it had existed, and we submit that the classification here is no less permissible than in the *Walz* case. Highways, colleges and law enforcement are so vastly different problems from public housing that these plaintiffs cannot be said to be "comparably situated" to highway users, etc.

E. THE VERY FEDERAL LEGISLATION WHICH LED TO ARTICLE XXXIV ILLUMINATES THE RATIONALITY OF THE CLASSIFICATION

Article XXXIV is a response to the invitation of the Housing Act of 1937.[50] That Act extends an invitation to the States to employ the funds and credit of the United States to bear some of the cost of alleviating housing shortages. The Act several times emphasizes that *local control* is its keynote policy. §§ 1, 15(7)(a, b), 42 U.S.C. §§ 1401, 1415(7)(a, b). Thus the United States Housing Authority may not enter into a contract for preliminary loan "unless the governing body of the locality involved has by resolution approved the application . . ." (§ 15(7)(a)) or into a contract for any other loan "unless the governing body of the

50. Act of Sept. 1, 1937, c. 896, 50 Stat. 888, as amended, 63 Stat. 422, 429, 73 Stat. 679, 82 Stat. 504; 42 U.S.C. §§ 1401, et seq.

locality has entered into an agreement . . . for . . . local cooperation . . ." (§ 15(7)(b)). All this is required "[i]n recognition that there should be local determination of the need for low-rent housing. . . ." 42 U.S.C. § 1415(7). In 1959, Section 1 of the Act (42 U.S.C. § 1401) was amended to state:

> "It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program * * *" (Act of Sept. 23, 1959, Pub.L. 86-372, Title V, § 501; 73 Stat. 679)

Where control is to be local, where federal law emphasizes that desideratum, where the basic criterion is that there be "local determination of the need for low-rent housing" before such housing may be brought into a community and a major part of the cost be placed on the community, what more appropriate or permissible than that the voice of that local determination be the people themselves?

As we have seen (pp. 7, 8, supra), just 8 months after California adopted Article XXXIV in 1950, Congress provided in 1951 in the Independent Offices Appropriation Act that the United States Housing Authority *"shall not* . . . authorize the construction of any projects" in any locality in which the project may be *"rejected by* the governing body of the locality or *by public vote"*. Congress repeated this prohibition in the Independent Offices Appropriation Act enacted in 1952. By the Independent Offices Appropriation Act enacted in 1953, it specified that no housing should be authorized, nor any authorized go forward, "where the people of that community, by their duly elected representatives, *or by referendum,* have indicated they do not want it."

Although these Congressional restraints were not repeated after 1953 and are not now part of the Congressional enactment, we submit that they plainly demonstrate the rationality of placing low cost housing in a category of its own peculiarly justifying a requirement of voter approval. *The closer a subdivision of the*

government gets to the grass roots, the more reasonable is a classification requiring voter approval, as witness the colonial New England town meeting.

F. THE PURPOSE AND EFFECT OF ARTICLE XXXIV ARE TO DETERMINE HOW STATE POWER SHALL BE DISTRIBUTED BY CALIFORNIA AMONG ITS OWN GOVERNMENTAL ORGANS. SUCH A PROVISION PRESENTS NO QUESTION JUSTICIABLE IN A FEDERAL COURT

Since motive and purpose of both the adoption of Article XXXIV and of voter action under it are immune from question, the appellees' case comes down to the bare claim that it is unconstitutional to require voter approval at all! And since Article XXXIV treats alike all who come within its subject matter, the claim further reduces itself to the contention that Article XXXIV is unconstitutional because, supposititiously, *some* kinds of federal aid, irrespective of magnitude or burden on the public, may be obtained without public vote. This kind of attack is simply an assault on a structure of government, an insistence that the equal protection clause forbids a State from requiring voter approval of anything unless it requires voter approval of everything! We submit that the contention is not merely erroneous, it is fantastic.

The federal Housing Act of 1937 was an invitation to the State to employ federal assistance upon *local determination* of its need (see pp. 53, 54 supra). California accepted that invitation. In doing so, it assumed that the determinations of its agencies were subject to review and veto by the people, under its all-pervasive referendum procedure. When it was informed otherwise by its Supreme Court and learned of loopholes (see pp. 6, 8-11, 34, 36 supra), it hastened to correct its distribution of the exercise of state sovereignty. It did so because the burden financially and environmentally falls on the local citizens. Therefore, by Article XXXIV of the Constitution, California now and since 1950 accepts the invitation of federal aid only on the basis that the *people themselves* determine the need and the desirability for low-

rent housing in their communities. That determination by California does not implicate the Constitution of the United States in any manner. The sovereignty of a State rests in its people. The manner in which they distribute or parcel out its exercise is not a federal justiciable question. *Highland Farms Dairy v. Agnew,* 300 U.S. 608, 612 (1937); *Hughes v. Superior Court,* 339 U.S. 460, 466-67 (1950). They may retain all or any part of it in their own hands, as by the initiative or referendum. *Pacific Tel. Co. v. Oregon,* 223 U.S. 118 (1912). Granting some or all of that exercise of sovereignty to legislative bodies, state or local, they may retain or resume the remainder. As this Court said in *Highland Farms Dairy v. Agnew,* supra, at 612:

> "The Constitution of the United States in the circumstances here exhibited has no voice upon the subject. The statute challenged as invalid is one adopted by a state. . . . How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."

And this is true even should it be true that, in practice, the State's decision may make it more difficult for any particular group within the State to obtain the advantages it desires, so long as the decision is grounded in neutral principle, as is Article XXXIV. *Hunter v. Erickson,* 393 U.S. 385 (1969). True, *Hunter v. Erickson* tells us that a "legislative structure which otherwise would violate the Fourteenth Amendment" is not immunized by popular referendum (p. 392). But that is not this case. *Here it is not claimed that anything violates the Fourteenth Amendment except the provision for referendum itself! Hunter v. Erickson* also reminds us of what no reminder should have been necessary, that the "sovereignty of the people is itself subject" to constitutional limitations on the State. That principle, as *Hunter v. Erickson* itself applies it, reaches a rearrangement of the distribution of legislative powers on racially discriminatory lines. That is not this case either.

The subject matter of "equal protection" is the impact of the law on the citizenry. The question it asks is whether an enactment lays the lash differently on the back of one citizen than on that of another or hands privileges to one that it withholds from another, both in like position vis-a-vis criteria the law recognizes. (Race and color are not valid criteria.) But the court below has *shifted to a radically different type of inquiry entirely.* Its phrasing is that "the state cannot make it more difficult to enact legislation on behalf of one group than on behalf of others" (A. 174). Thus it divides society into pressure groups, each seeking advantages for itself from the government, and it asks whether the machinery of government makes it more difficult for one group to obtain advantages than another. We need not ask, in this case, whether this mode of examination is ever permissible. (It may be, for example, if a state constitution required a two-thirds vote to enact any laws the effect of which was to benefit Negroes as such.) But the inquiry is so different that courts, we submit, should answer it with caution if they ask it at all. By its very nature the democratic process makes it less possible for small groups to obtain their wishes than large, because there are fewer voters. A voting system necessarily affords a relatively weaker position to a small group than to a large, unless the members of the smaller group are given multiple votes in defiance of the one man-one vote requirement of equal protection. The smaller group is not thereby denied equal protection. On the contrary, "equal protection" as taught in the one-man one-vote cases forbids concern with voting power of "groups". "Citizens, not history or economic interests, cast votes", *Reynolds v. Sims,* 377 U.S. 533, 580 (1964). "Equal protection" concerns itself with individuals, not groups, *Shelley v. Kraemer,* 334 U.S. 1, 22 (1948). Beyond that, the democratic process is not one of scientific precision. And no one, either politician, professor, philosopher or jurist, possesses the wisdom to make it so. As said by Mr. Justice Douglas for a unanimous court in *Sailors v. Kent Board of Education,* 387 U.S. 105, 109:

" 'The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment.' "

The democratic process lives and grows by day-to-day experience and experiment. Justice Brandeis stood firmly against use of the 14th Amendment to invalidate state legislation, because he perceived that the states are laboratories of experimentation, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932). And this Court renewed its attachment to that principle, in *Sailors v. Kent Board of Education, supra*, when it reaffirmed (p. 109),

" '. . . the state legislatures have constitutional authority to experiment with new techniques'.

* * * *

"Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs."

The course of the democratic political process is for the people to become aroused about *particular* abuses, not about theoretical wholes that lawyers and judges might later construct. The decision below rests on a notion that would tie the hands of the voters. They would be given but two choices, either not to act at all when an abuse comes to their attention or else to devise an all-inclusive body of regulation that would cover all possible situations that acute minds might later think to be similar.

If the equal protection clause permits inquiry into whether the machinery of government makes it more difficult for one "group" to obtain advantages than another, such an inquiry should require a specific pin-pointing of "groups" supposed to be better advantaged. The court below has wholly failed in this respect. Relative

to low-income housing it *constructs* a group called "the poor". But what group is advantaged by "highways", "hospitals", "education", "law enforcement", or "urban renewal"? The answer is: no "group". It is the *whole* of society, the whole of the body politic, that is benefited, and each of these subject matters possesses characteristics entirely different from low-income housing. Moreover, it is an astigmatized vision that sees low-income housing as designed to aid a "group" called "the poor". The constitutionality of low-income housing and urban renewal has been upheld because they serve a public purpose by serving the whole social fabric. *Berman v. Parker*, 348 U.S. 26 (1954); *Housing Authority v. Dockweiler*, 14 Cal.2d 447, 94 P.2d 794 (1939); *Redevelopment Agency v. Hayes*, 122 Cal.App.2d 777, 266 P.2d 105 (1954), cert. denied *sub. nom. Van Hoff v. Redevelopment Agency*, 348 U.S. 897 (1954). Low-income housing is provided by California because it benefits the whole of the social organism, and it does so in respects quite different from "highways", "hospitals", "education", "law enforcement", etc. Consequently, a different way of handling it denies equal protection to no one.

In three recent cases Courts of Appeals have been called upon to consider state referendum statutes which came far closer than does Article XXXIV to violating the principles of *Hunter v. Erickson* and *Reitman v. Mulkey*. In each case the State's decision to submit a proposal to referendum was upheld against a charge of violation of Equal Protection. *Spaulding v. Blair*, 403 F.2d 862 (4th Cir. 1968); *Ranjel v. City of Lansing*, 417 F.2d 321 (6th Cir. 1969), cert. denied 397 U.S. 980; *Southern Alameda Spanish Speaking org. v. City of Union City, Cal.*, 424 F.2d 291 (9 Cir. 1970).

In *Spaulding v. Blair*, plaintiffs were Negroes who sought to prevent the submission of an open-housing amendment to referendum. Speaking for the court, Judge Sobeloff said, 403 F.2d at 864,

> "No contention is made that a state may not constitutionally apportion its legislative power between elected rep-

> resentatives of the people and the people themselves. Nor is it suggested that Chapter 385, if approved by the voters, would be unconstitutional. In these circumstances, it must be concluded that a federal court is without power to enjoin a valid state legislative procedure."

In the *Ranjel* case, there was a petition for a referendum upon an ordinance rezoning a 20-acre site from one-family residential to a community unit plan, which would permit the construction of 250 low-rent housing units by a private developer using HUD funds. The plaintiffs, poor black and Mexican-Americans, sought to enjoin the referendum. The District Court granted an injunction. Citing *Hunter v. Erickson, Reitman v. Mulkey,* and *Spaulding v. Blair,* the Court of Appeals reversed. It said, 417 F.2d at 324,

> "Initiative and referendum is an important part of the state's legislative process. Being founded on neutral principles, it should be exempt from Federal Court constraints."

In *Southern Alameda Span. Spg. Org. v. City of Union City, Cal.,* 424 F.2d 291 (1970), the plaintiff "was successful in obtaining the passage of a city ordinance rezoning a tract of land within Union City, California, to a multi-family residential category in order to permit the construction of a federally financed housing project for low and moderate income families. The ordinance was nullified almost immediately by a city-wide referendum." Plaintiff attacked the referendum and its results "as infringing upon their constitutional rights under the due process and equal protection clauses of the Fourteenth Amendment." Plaintiff appealed from refusal to convene a three-judge court and refusal to order the zoning changes into effect. The Ninth Circuit affirmed, saying (p. 294):

> "A referendum, however, is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters—an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what

serves the public interest. See Spaulding v. Blair, 403 F.2d 862 (4th Cir. 1968). This question lay at the heart of the proposition put to the voters. That some voters individually may have failed to meet their responsibilities as legislators to vote wisely and unselfishly cannot alter the result.

* * *

"Many environmental and social values are involved in a determination of how land would best be used in the public interest. The choice of the voters of Union City is not lacking in support in this regard."

These, we submit, are the principles that control this case. They were completely overlooked by the court below.

The plaintiffs' case here is a stupefying reversal of history. The initiative and referendum were born of an urge to curb the power of the wealthy and entrenched so as to benefit the disadvantaged. Yet, now, they are attacked and enjoined as working to the disadvantage of the disadvantaged! To embark on the task of analyzing different forms of governmental structure to the end of determining which is more likely to be equally attuned to the demands or needs of all the groups in which the citizenry falls—and in one way or another everyone is a member of some minority—would call for divine wisdom. For a court to embark on that task and to utilize the 14th Amendment to redistribute the legislative powers of a state on the basis that a different allocation would better serve this or that minority group is to open up an unpredictable future. Today taxpayers in revolt may vote down bond issues that a timorous city council, subjected to the "confrontation" of pressure groups, would vote. Tomorrow legislative bodies may stand in the way of measures for which today's youth, then grown to maturity, will vote behind the privacy of the curtain of the polling booth. The Equal Protection Clause has been invoked and applied to protect and expand the people's right to vote, *Reynolds v. Sims,* 377 U.S. 533 (1964); *Harper v. Virginia Board of Elections,* 383 U.S. 633 (1969); now

it has been invoked and applied below to deny the right to vote. This, we submit, is a misapplication.

We return to the language of the Equal Protection Clause of the 14th Amendment:

> "No state * * * shall ** * * deny to any person within its jurisdiction the equal protection of the laws."

As a matter of explicit English direction, this prescribes that, regardless of who makes the law, it shall operate alike on all in like situation. It asserts nothing about how laws shall be made unless the very manner of their making *indubitably and inevitably* works a discrimination in their operation or is intended to do so. *That is not this case.*

When low rent housing first originated in the 1930's, and it was feared that courts would strike down enabling legislation, Mr. E. H. Foley, Jr., Director of the legal Division of the Federal Emergency Administration of Public Works, wrote in "Low Rent Housing and State Financing", 85 University of Pennsylvania Law Review, 239, 259 (1937):

> "But whatever the conflict may be as to the wisdom of state action in the housing field, it is submitted that this conflict presents a legislative rather than a judicial question. It is not for judges to strike down legislation simply because it does not conform with their own social or economic predelictions."

We submit that this observation is as true now as it was then, when the threat came from the other end of the spectrum.

CONCLUSION

We submit that a respectful regard for the American federal system—for the unique relationship between the federal authority and state authority—should not countenance the kind of summary disposition this case received below. The acknowledged paramountcy of the federal authority is universally accepted be-

cause it is sensitively applied and exercises "scrupulous regard for the rightful independence of the state governments". *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 501 (1941).

We respectfully submit that the judgment should be reversed with direction to dismiss the complaint.

Dated, San Francisco, California, August 11, 1970.

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